

1 CHRISTOPHER A. NEDEAU (CA SBN 81297)
CARL L. BLUMENSTEIN (CA SBN 124158)
2 PATRICK J. RICHARD (CA SBN 131046)
KATHARINE CHAO (CA SBN 247571)
3 NOSSAMAN LLP
4 50 California Street, 34th Floor
San Francisco, CA 94111
5 Telephone: 415.398.3600
Facsimile: 415.398.2438
6 cnedeau@nossaman.com
cblumenstein@nossaman.com
7 prichard@nossaman.com
kchao@nossaman.com
8

9 Attorneys for Defendants AU OPTRONICS CORPORATION
and AU OPTRONICS CORPORATION AMERICA

10 KARL D. BELGUM (CA SBN 122752)
11 JOHN R. FOOTE (CA SBN 99674)
NIXON PEABODY LLP
12 One Embarcadero Center, 18th Floor
San Francisco, CA 94111
13 Telephone: 415.984.8200
Facsimile: 415.984.8300
14 kbelgum@nixonpeabody.com
15 jfoote@nixonpeabody.com

16 Attorneys for Plaintiff EASTMAN KODAK COMPANY

17 [additional counsel and defendants on signature page]

18 UNITED STATES DISTRICT COURT

19 NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO DIVISION

21 THIS DOCUMENT RELATES TO:
22 3:10-CV-5452 SI

Case No. 3:10-CV-5452 SI

23 EASTMAN KODAK COMPANY

MDL NO. 3:07-MD-1827 SI

24 Plaintiff,

**STIPULATION AND [PROPOSED] ORDER
TO FILE DOCUMENT NUNC PRO TUNC**

25 vs.

26 EPSON IMAGING DEVICES CORPORATION,
27 et al,

28 Defendants.

1 WHEREAS on December 1, 2010, plaintiff EASTMAN KODAK COMPANY ("Kodak") filed a
2 complaint in the above-captioned case, case number 3:10-CV-5452 SI (the "Individual Case"), against
3 defendants EPSON IMAGING DEVICES CORPORATION, EPSON ELECTRONICS AMERICA,
4 INC., TOSHIBA CORPORATION, TOSHIBA AMERICA ELECTRONIC COMPONENTS, INC.,
5 TOSHIBA MOBILE DISPLAY CO., LTD., AU OPTRONICS CORPORATION, and AU
6 OPTRONICS CORPORATION AMERICA (collectively "Defendants");

7 WHEREAS the Individual Case is related to the multi-district proceedings consolidated in this
8 Court entitled *In re: TFT-LCD (Flat Panel) Antitrust Litigation*, case number 3:07-MD-1827-SI (the
9 "MDL Case");

10 WHEREAS on June 22, 2011, Kodak filed under seal a first amended complaint ("Amended
11 Complaint");

12 WHEREAS on July 22, 2011, Defendants timely filed in the Individual Case, but not in the
13 MDL Case, a joint motion to dismiss the Amended Complaint;

14 WHEREAS Defendants intended to also file the motion to dismiss in the MDL Case pursuant to
15 this Court's Pretrial Order #1 and Agenda for July 10, 2007 Status Conference filed July 3, 2007, which
16 requires that "[a]ll documents shall be e-filed in the master file, No. M 07-1827 SI. Documents that
17 pertain to one or only some of the pending actions shall *also* be e-filed in the individual case(s) to which
18 the documents pertain";¹

19 WHEREAS Kodak and Defendants agree that Defendants should be permitted to file their
20 motion to dismiss in the MDL Case *nunc pro tunc* to July 22, 2011;

21 THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and among the undersigned
22 counsel, on behalf of their respective clients, that:

23 Pending and upon approval by the Court of this Stipulation, Defendants' joint motion to dismiss
24 the Amended Complaint, a copy of which is attached hereto as Exhibit A, shall be filed in case number
25 3:07-MD-1827 *nunc pro tunc* to July 22, 2011.
26
27
28

¹ See MDL Docket No. 180 ¶ 7 (emphasis in original).

Respectfully submitted,

DATED: August 5, 2011

BY: /s/ Christopher A. Nedeau
Christopher A. Nedeau
Attorneys for Defendants
AU OPTRONICS CORPORATION and
AU OPTRONICS CORPORATION AMERICA

By: /s/ Stephen P. Freccero
Stephen P. Freccero
Melvin R. Goldman (CA SBN 34097)
Stephen P. Freccero (CA SBN 131093)
Derek F. Foran (CA SBN 224569)
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105-2482
Telephone: (415) 268-7000
Facsimile: (415) 268-7522
mgoldman@mofo.com
sfreccero@mofo.com
dforan@mofo.com

Attorneys for Defendants
EPSON IMAGING DEVICES CORPORATION and
EPSON ELECTRONICS AMERICA, INC.

By: /s/ John H. Chung
John H. Chung
John H. Chung (admitted *pro hac vice*)
WHITE & CASE LLP
1155 Avenue of the Americas
New York, NY 10036-2787
Telephone: (212) 819-8200
Facsimile: (212) 354-8113
jchung@whitecase.com

Christopher M. Curran (*pro hac vice*)
Kristen J. McAhren (*pro hac vice*)
WHITE & CASE LLP
701 Thirteenth Street, NW
Washington, DC 20005
Telephone: (202) 626-3600
Facsimile: (202) 639-9355
ccurran@whitecase.com
kmcahren@whitecase.com

Attorneys for Defendants
TOSHIBA CORPORATION, TOSHIBA AMERICA
ELECTRONIC COMPONENTS, INC., and TOSHIBA
MOBILE DISPLAY CO., LTD.

By: /s/ John R. Foote
John R. Foote

Karl D. Belgum (CA Bar No. 122752)
John R. Foote (CA Bar No. 99674)
NIXON PEABODY LLP
One Embarcadero Center, 18th Floor
San Francisco, CA 94111
Telephone: (415) 984-8200
Facsimile: (415) 984-8300
kbelgum@nixonpeabody.com
jfoote@nixonpeabody.com

Attorneys for Plaintiff
EASTMAN KODAK COMPANY

Pursuant to General Order 45, Part X-B, the filer attests that concurrence in the filing of this document has been obtained from the signatories to this document.

IT IS SO ORDERED.

Dated: 8/5/11



The Honorable Susan Illston
U.S. District Judge, Northern District of California

EXHIBIT A

1 CHRISTOPHER A. NEDEAU (CA SBN 81297)
2 CARL L. BLUMENSTEIN (CA SBN 124158)
3 PATRICK J. RICHARD (CA SBN 131046)
4 KATHARINE CHAO (CA SBN 247571)
5 NOSSAMAN LLP
6 50 California Street, 34th Floor
7 San Francisco, CA 94111
8 Telephone: 415.398.3600
9 Facsimile: 415.398.2438
10 cneadeu@nossaman.com
11 cblumenstein@nossaman.com
12 prichard@nossaman.com
13 kchao@nossaman.com

14 Attorneys for Defendants
15 AU OPTRONICS CORPORATION and
16 AU OPTRONICS CORPORATION AMERICA

17 [additional defendants on signature page]

18 UNITED STATES DISTRICT COURT

19 NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO DIVISION

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21 3:10-CV-5452 SI

22 EASTMAN KODAK COMPANY

23 Plaintiff,

24 vs.

25 EPSON IMAGING DEVICES CORPORATION,
26 et al,

27 Defendants.

Case No. 3:10-CV-5452 SI

MDL NO. 3:07-MD-1827 SI

**DEFENDANTS' JOINT NOTICE OF
MOTION AND MOTION TO DISMISS THE
FIRST AMENDED COMPLAINT**

Date: August 26, 2011

Time: 9:00 A.M.

Location: Courtroom 10, 19th Floor
450 Golden Gate Avenue
San Francisco, CA 94102

NOTICE OF MOTION AND MOTION TO DISMISS

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on August 26, 2011 at 9:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom 10, 19th Floor, 450 Golden Gate Avenue, San Francisco, California, before the Honorable Susan Illston, the defendants listed in the signature blocks below will and hereby do move the Court, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for an Order dismissing the First Amended Complaint for Damages and Injunctive Relief ("FAC") filed by Plaintiff Eastman Kodak Company ("Kodak").

This motion is based upon this Notice of Motion, the following Memorandum of Points and Authorities, argument of counsel, and such other matters as the Court may consider.

MEMORANDUM OF POINTS AND AUTHORITIES**I. ISSUES TO BE DECIDED**

1. Whether all claims asserted by Kodak should be dismissed because Kodak fails to allege sufficient facts regarding the involvement of each defendant in the alleged price-fixing conspiracy.

2. Whether Kodak's second claim for violation of California antitrust law based on all U.S. purchases ("Second Claim") must be dismissed pursuant to the Due Process Clause and *AT&T Mobility, LLC v. AU Optronics Corp.*, 2010 WL 2609434 (N.D. Cal. June 28, 2010) (hereinafter "*AT&T Mobility*").

II. INTRODUCTION

Kodak seeks damages for its alleged purchase of digital cameras containing thin film transistor liquid crystal display panels ("TFT-LCD Panels"). Kodak alleges that the TFT-LCD Panels were the subject of an alleged price-fixing conspiracy. (FAC ¶¶ 1-2.)¹ Kodak's FAC should be dismissed under Federal Rule of Civil Procedure 12(b)(6) for two reasons.

First, the FAC fails to sufficiently allege each defendant's involvement in the alleged price-fixing conspiracy. The FAC groups corporate family members together as one entity and fails to differentiate among the members. Instead of alleging specific conduct as to each defendant, as required

¹ The FAC does not allege damages based on purchases of finished products containing TFT-LCD Panels that Kodak purchased for its own consumption rather than for re-sale.

1 under *Twombly* and *Iqbal*, Kodak impermissibly relies on group pleading to generically allege the
2 conduct of seven separate entities. Under established authority and prior orders of this Court,
3 conclusory allegations of agency between corporate family members are insufficient to state an antitrust
4 conspiracy claim against individual defendant entities. Therefore, Kodak's federal and state claims as to
5 all defendants should be dismissed.

6 Second, Kodak's Second Claim seeks to apply California antitrust law to "All U.S. Purchases."
7 (FAC at p. 24:24.) The only states in which Kodak expressly alleges it made purchases are New York,
8 California, Nevada, Georgia, Colorado, and Tennessee. (*Id.* ¶ 29.) To the extent the Second Claim
9 seeks relief under California law for purchases made in any state other than California, the Second
10 Claim must be dismissed under *AT&T Mobility*.

11 **III. FACTUAL BACKGROUND**

12 Kodak alleges that "[f]rom as early as January 1, 1996 through at least December 11, 2006 ('the
13 Conspiracy Period'), defendants and their co-conspirators conspired with the purpose and effect of
14 fixing, raising, stabilizing, and maintaining prices for LCD Panels." (FAC. ¶ 2.) Kodak names as
15 defendants AU Optronics Corporation, Epson Imaging Devices Corporation, Toshiba Corporation, and
16 Toshiba Mobile Display Technology Co., Ltd., four companies that are all located in Taiwan or Japan.
17 (*Id.* ¶¶ 16, 19, 22, 23.) The FAC also names numerous United States subsidiaries and affiliates of these
18 foreign companies: AU Optronics Corporation America; Epson Electronics America, Inc.; and Toshiba
19 America Electronic Components, Inc. (*Id.* ¶¶ 17, 20, 24, 25.)

20 Kodak asserts five claims for relief. Its first claim seeks injunctive relief under Section 1 of the
21 Sherman Act. (*Id.* ¶ 81.) Its four remaining claims seek relief under the antitrust laws of California,
22 Nevada, and New York. (*Id.* ¶¶ 82-101.)

23 **IV. LEGAL STANDARD**

24 A complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief
25 that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v.*
26 *Twombly*, 550 U.S. 544, 570 (2007)); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 599 F. Supp. 2d
27 1179, 1184 (N.D. Cal. 2009) (a plaintiff's complaint must "contain sufficient factual allegations 'to raise
28 a right to relief above the speculative level.'"). A plaintiff must "provide the 'grounds' of his

1 'entitlement to relief' [which] requires more than labels and conclusions, and a formulaic recitation of
2 the elements of a cause of action will not do." *Hutson v. Am. Home Mortg. Servicing, Inc.*, No. C 09-
3 1951, 2009 WL 3353312, at *7 (N.D. Cal. Oct. 16, 2009) (citing *Twombly*, 550 U.S. at 555).

4 When faced with a motion to dismiss, a court "can choose to begin by identifying pleadings that,
5 because they are no more than conclusions, are not entitled to the assumption of truth. While legal
6 conclusions can provide the framework of a complaint, they must be supported by factual allegations."
7 *Iqbal*, 129 S. Ct. at 1950. Only "when there are well-pleaded factual allegations, a court should assume
8 their veracity." *Id.* Even then, the court must "determine whether [the factual allegations] plausibly
9 give rise to an entitlement to relief." *Id.* "[T]he court is not required to accept as true 'allegations that
10 are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.'" *In re TFT-LCD*
11 *(Flat Panel) Antitrust Litig. (Nokia)*, No. M 07-1827 SI, 2010 WL 2629728, at *2 (N.D. Cal. June 29,
12 2010) (hereinafter "*Nokia*") (quoting *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008)).

13 V. ARGUMENT

14 A. Kodak Continues To Rely On Impermissible Group Pleading.

15 1. The FAC Should Be Dismissed Because Kodak Does Not 16 Allege Sufficient Facts Particular to Each Defendant.

17 To survive a motion to dismiss, a plaintiff must allege a plausible set of factual allegations to
18 show that it is entitled to relief *as to each named defendant*. *Iqbal*, 129 S. Ct. at 1949; *Twombly*, 550
19 U.S. at 555, 557; *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109, 1116-17 (N.D. Cal.
20 2008) (granting in part motion to dismiss complaints in related class cases and holding that the "Court
21 agrees that general allegations as to all defendants, to 'Japanese defendants,' or to a single corporate
22 entity such as 'Hitachi' is insufficient to put specific defendants on notice of the claims against them");
23 *see also Nokia*, 2010 WL 2629728, at *7 (granting motion to dismiss and providing that "[w]hile the
24 complaint need not include elaborate detail about [a corporate entity's] role, the complaint 'must allege
25 that each individual defendant joined the conspiracy and played some role in it because, at the heart of
26 an antitrust conspiracy is an agreement and a conscious decision by each defendant to join it'" (quoting
27 *In re Elec. Carbon Prods. Antitrust Litig.*, 333 F. Supp. 2d 303, 311-12 (D.N.J. 2004)).

1 Kodak has ignored these rules. Kodak asserts its broad allegations against seven parent,
2 subsidiary, and affiliated entities as “Defendants” without specific allegations regarding the conduct of
3 each defendant. Kodak alleges that “[d]uring and after the Conspiracy Period, defendants, one or more
4 of their subsidiaries, and their co-conspirators sold LCD Panels in the United States through and into
5 interstate and foreign commerce, including through California, New York, and Nevada.” (FAC ¶ 30.)
6 Kodak also alleges that “Defendants’ and their co-conspirators’ business activities substantially affected
7 interstate trade and commerce in the United States, and various states, and caused antitrust injury in the
8 United States and such states.” (*Id.* ¶ 33.) Nowhere does Kodak allege which defendant sold TFT-LCD
9 Panels in what locations, or how any particular defendant’s “business activities” substantially affected
10 interstate commerce, much less how these unspecified “business activities” caused any antitrust injury.

11 Moreover, the FAC makes conclusory allegations regarding corporate families without
12 specifying the acts or involvement of any particular entity. Kodak does not even attempt to specifically
13 tie affiliates or subsidiaries to a single factual allegation in the FAC. After first introducing each
14 defendant in the “Parties” section of the FAC, Kodak gets lazy. Its remaining allegations against
15 defendants use one label to sweep in members of each corporate family. For example, the FAC alleges
16 that “[i]n the early years of the conspiracy, beginning in at least 1996, representatives of the Japanese-
17 based conspirators, such as Sharp and Toshiba, met and agreed to fix the prices for LCD Panels
18 generally[.]” (*Id.* ¶ 38.) It is impossible to tell from the face of the FAC which Toshiba entity this
19 allegation references.²

20 Next, the FAC alleges that “officials from AU Optronics, Chunghwa, Chi Mei, HannStar, LG
21 Display, and Sharp met periodically in Taiwan to discuss and reach agreements on LCD Panel prices[.]”
22 (*Id.* ¶ 41.) The FAC also refers generically to “defendants’ high-level executives” as having attended
23 “Crystal Meetings” at which pricing agreements were allegedly reached. (*Id.* ¶¶ 41-42.) Again, it is
24 impossible to tell from these vague allegations which company’s executives attended these alleged
25 meetings. With regard to alleged bilateral discussions, Kodak merely refers generally to a corporate
26

27
28 ² The fact that Kodak chose to define, for example, all Toshiba entities as “Toshiba” does not save its
FAC. (FAC ¶ 25.) Kodak cannot make blanket, indiscriminate allegations against each defendant
entity. Rather, it “must specifically plead how each individual defendant joined the alleged price-
fixing conspiracy.” *Nokia*, 2010 WL 2629728, at *7.

1 family group and/or groups the companies by country, without attributing the conduct to any specific
2 entity. (*Id.* ¶ 45 (“Participants at the Crystal meetings contacted Japanese conspirators (such as Sharp
3 and Toshiba) to relay the agreed-upon pricing and production limitations.”).

4 The law does not allow these shortcuts. *Nokia*, 2010 WL 2629728, at *7 (“[A]n antitrust
5 plaintiff *must specifically plead how each individual defendant joined* the alleged price-fixing
6 conspiracy.”) (emphasis added). Kodak cannot label the seven individual entities named in the FAC
7 “Defendants” and refer generically to an undifferentiated corporate family group. Rather, as this Court
8 has held, Kodak must “allege that each individual defendant joined the conspiracy and played some role
9 in it because, at the heart of an antitrust conspiracy is an agreement and a conscious decision by each
10 defendant to join it.” *Nokia*, 2010 WL 2629728, at *7 (dismissing claims where the FAC failed to allege
11 “*how* [the subsidiary] participated in the conspiracy”) (emphasis in original, quotation omitted). Simply
12 put, Kodak has not adequately articulated how any of the individual entities are viable defendants.
13 Thus, the FAC must be dismissed.³ *Iqbal*, 129 S. Ct. at 1955 (“A claim has facial plausibility when the
14 plaintiff pleads factual content that allows the court to draw the reasonable inference that *the defendant*
15 is liable for the misconduct alleged.”) (emphasis added); *see also Total Benefits Planning Agency, Inc. v.*
16 *Anthem Blue Cross and Blue Shield*, 552 F.3d 430, 436 (6th Cir. 2008) (“generic pleading, alleging
17 misconduct against defendants without specifics as to the role each played in the alleged conspiracy, was
18 specifically rejected by *Twombly*”); *In re Elevator Antitrust Litig.*, 502 F.3d 47, 50-51 (2d Cir. 2007)
19 (conclusory allegations of conspiracy inadequate where complaint alleges conspiratorial activity
20 “without any specification of any particular activities by any particular defendant”); *Jung v. Ass’n of*
21 *Am. Med. Colls.*, 300 F. Supp. 2d 119, 163 (D.D.C. 2004) (“Plaintiffs cannot escape their burden of
22

23 ³ Any argument by Kodak that *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 599 F. Supp. 2d 1179
24 (N.D. Cal. 2009), permits group pleading without requiring specific factual allegations regarding
25 each defendant’s involvement in the alleged conspiracy is meritless. *See In re TFT-LCD (Flat*
26 *Panel) Antitrust Litig.*, No. M 07-1827 SI, 2010 U.S. Dist. LEXIS 64930 at *23-24 (N.D. Cal. June
27 29, 2010) (dismissing Philips Electronics North America Corporation (“PENAC”) from complaint
28 filed by Nokia). In dismissing PENAC from the Nokia complaint, the Court held that allegations
pertaining to “defendants” generally, or to other defendants, failed to state a claim against PENAC.
Id. at 23. The Court acknowledged its prior holding that “*detailed* defendant by defendant pleading
was not required by *Twombly*,” but clarified that “an antitrust plaintiff must *specifically* plead how
each individual defendant joined the alleged price-fixing conspiracy.” *Id.* (emphasis added). The
impropriety of group pleading is particularly problematic where, as here, Kodak’s counsel has access
to extraordinary amounts of information in connection with discovery taken in related proceedings.

1 alleging that each defendant participated in or agreed to join the conspiracy by using the term
2 'defendants' to apply to numerous parties without any specific allegations" about each defendant.); *In re*
3 *Sagent Tech, Inc., Deriv. Litig.*, 278 F. Supp. 2d 1079, 1094-95 (N.D. Cal. 2003) (complaint insufficient
4 where it "lumps together" 13 separate defendants).

5 **2. Kodak's Bare Allegations of Agency and Alter Ego Do Not Save**
6 **The FAC From Failure to Allege Each Defendant's Participation**
7 **in the Alleged Conspiracy.**

8 Rather than specifying each defendant's involvement in the alleged conspiracy, Kodak
9 summarily alleges that the subsidiaries and affiliates are agents or alter egos of the parent company.
10 (FAC ¶¶ 18, 21, 25.) But summary allegations of agency between corporate entities do not resolve the
11 pleading deficiency as to the individual entities. Under *Twombly* and *Iqbal*, Kodak cannot bring an
12 entire corporate family into the case as one amalgamated defendant. *Nordberg v. Trilegiant Corp.*, 445
13 F. Supp. 2d 1082, 1103 (N.D. Cal. 2006) (Patel, J.), *abrogated on other grounds by Odom v. Microsoft*
14 *Corp.*, 486 F.3d 541 (9th Cir. 2007) (holding that mere conclusory allegations of agency between
15 corporate family members are insufficient to state a claim against individual entities); *see also In re*
16 *ATM Fee Antitrust Litig.*, 2009 U.S. Dist. LEXIS 83199, at *55-56 (N.D. Cal. Sept. 4, 2009) (Breyer, J.)
17 (dismissing FAC where plaintiffs "merely lump[ed] together allegations against [a] holding company
18 and its subsidiary."). Under well-established law, distinct corporate family members are presumed to
19 act separately and independently. *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) (citing *Berkey v.*
20 *Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926) (Cardozo, J.)).

21 Applying these principles here, Kodak's FAC fails to pass muster. The FAC contains no factual
22 allegations to demonstrate that any of the subsidiary or affiliate defendants was an agent for or alter ego
23 of a parent defendant. *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d at 1116-17
24 (granting motion to dismiss for lack of specific allegations as to each defendant; "general allegations as
25 to all defendants, to 'Japanese Defendants,' or to a single corporate entity such as 'Hitachi' is
26 insufficient to put specific defendants on notice of the claims against them."). Kodak has impermissibly
27 "alleg[ed] that each defendant participated in or agreed to join the conspiracy by using the term
28

1 'defendants' to apply to numerous parties without any specific allegations." *Jung*, 300 F. Supp. 2d at
2 164 (granting motion to dismiss vague and conclusory conspiracy allegations against "defendants").

3 **3. The Court Should Dismiss The FAC Based on These Group**
4 **Pleading Deficiencies Without Leave To Amend.**

5 The FAC should now be dismissed without leave to amend. Kodak was already on notice of
6 these group pleading deficiencies by defendants' prior motion to dismiss the original complaint. *See*
7 Docket No. 12. Instead of opposing defendants' prior motion, Kodak chose to file the FAC. The FAC
8 fails to cure the pleading defects. Given that Kodak has had access to voluminous discovery in these
9 MDL proceedings since initiating this action, Kodak's failure should not be excused. The FAC plainly
10 demonstrates Kodak's inability to specifically plead the involvement of each named defendant in any
11 alleged price fixing conspiracy related to TFT-LCD Panels for digital cameras. Therefore, dismissal of
12 the FAC without leave to amend is proper. *Kendall v. Visa USA, Inc.*, 518 F.3d 1042, 1051-52 (9th Cir.
13 2008) (affirming dismissal of amended Sherman Act complaint without leave to amend where plaintiff
14 was allowed some discovery to cure the original complaint's pleading defects yet failed to do so).

15 **B. The Second Claim Must Be Dismissed Because It Is Foreclosed By**
16 **This Court's Prior Order Limiting Application Of A State's Law**
17 **To Purchases Made In That State.**

18 In addition, Kodak's Second Claim applying California antitrust law to "All U.S. Purchases"
19 fails to state a claim because applying state law to purchases made outside that state violates Due
20 Process.

21 In its June 2010 order, this Court held that the Due Process Clause forbids application of state
22 antitrust law to purchases made outside of that state. *AT&T Mobility*, 2010 WL 2609434 at *3 (holding
23 that "in order to invoke the various state laws at issue, plaintiffs must be able to allege that 'the
24 occurrence or transaction giving rise to the litigation' – plaintiffs' purchases of allegedly price-fixed
25 goods – occurred in the various states.") (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981)).

26 Here, Kodak's Second Claim seeks relief under California's Cartwright Act for "All U.S.
27 Purchases." (FAC at p. 24:24). Kodak lists in support of its Second Claim the allegation that "During
28 the Conspiracy Period, Kodak purchased [digital cameras] containing price-fixed LCD Panels in

California and elsewhere in the United States[.]” (FAC ¶ 108c.) (emphasis added). The Second Claim, unlike Kodak’s other state-law claims, is not expressly limited to purchases made in the applicable state. (See *id.* ¶¶ 117, 122, 128.) These allegations clearly fail to state a claim under this Court’s order in *AT&T Mobility*. The Second Claim must be dismissed.⁴

VI. CONCLUSION

For the foregoing reasons, defendants respectfully request that the Court grant this motion and dismiss Kodak’s FAC without leave to amend for failure to state a claim upon which relief can be granted.

Respectfully submitted,

DATED: July 22, 2011

BY: /s/ Christopher A. Nedeau
Christopher A. Nedeau
Attorneys for Defendants
AU OPTRONICS CORPORATION and
AU OPTRONICS CORPORATION AMERICA

By: /s/ Stephen P. Freccero
Stephen P. Freccero
Melvin R. Goldman (CA SBN 34097)
Stephen P. Freccero (CA SBN 131093)
Derek F. Foran (CA SBN 224569)
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105-2482
(415) 268-7000 (Phone)
(415) 268-7522 (Facsimile)
mgoldman@mofo.com
sfreccero@mofo.com
dforan@mofo.com

Attorneys for Defendants
EPSON IMAGING DEVICES CORPORATION and
EPSON ELECTRONICS AMERICA, INC.

⁴ The fact that the Ninth Circuit granted, on May 10, 2011, a petition for interlocutory appeal from this Court’s order in *AT&T Mobility* does not change this result. See Ninth Circuit Court of Appeals Docket No. 11-16188. If the Ninth Circuit’s decision on the merits – which may not issue for many months or longer – would allow Kodak to assert the Second Claim, then Kodak may seek leave to amend to add such a claim under applicable rules and at the appropriate time. It would waste resources and unnecessarily complicate these proceedings to keep the Second Claim in the case as any kind of “place holder.”

By: /s/ John H. Chung
John H. Chung

John H. Chung (admitted *pro hac vice*)
WHITE & CASE LLP
1155 Avenue of the Americas
New York, NY 10036-2787
(212) 819-8200 (Phone)
(212) 354-8113 (Facsimile)
jchung@whitecase.com

Attorneys for Defendants
TOSHIBA CORPORATION, TOSHIBA AMERICA
ELECTRONIC COMPONENTS, INC., and TOSHIBA
MOBILE DISPLAY TECHNOLOGY CO., LTD.

Pursuant to General Order 45, Part X-B, the filer attests that concurrence in the filing of this document has been obtained from the signatories to this document.